2006

Deseret News Publishing Company v. Salt Lake County : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

DESERET NEWS PUBLISHING COMPANY, publisher of the *Deseret Morning News*, Plaintiff/Appellant vs. SALT LAKE COUNTY, a political subdivision of the State of Utah, and the SALT LAKE COUNTY DISTRICT ATTORNEY'S OFFICE, Defendant/Appellee.	Supreme Court No. 20060454 SC

BRIEF OF APPELLANT

Appeal from Order of the Third Judicial District Court
for Salt Lake County, State of Utah,
the Honorable Tyrone E. Medley Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-2(3)(2)(j) and the Utah Constitution, Art. VIII, § 3.

STATEMENT OF ISSUES, STANDARD OF REVIEW, AND PRESERVATION

1. Is the February 2004 independent investigative report ("Investigative Report" or "Report") commissioned by Salt Lake County concerning whether the Chief Deputy County Clerk engaged in persistent and egregious sexual harassment of subordinate employees, and what County officials knew and did about such misconduct, a public record under GRAMA?

Standard of Review: Whether the Investigative Report is properly classified as a public record under GRAMA presents a question of law that is reviewed for correctness, giving no deference to the trial court. *See Young v. Salt Lake County*, 2002 UT 70, ¶ 5, 52 P.3d 1240, 1242; *R.A. McKell Excavating, Inc. v. Wells Fargo Bank, N.A.*, 2004 UT 48, ¶ 7, 100 P.3d 1159, 1161; *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 20, 70 P.3d 1, 6.

2. Did the trial court err in concluding that the Investigative Report is properly classified as a private record under Utah Code Ann. § 63-2-302(2)(d)?

Standard of Review: Whether the Investigative Report is properly classified as a private record pursuant to Utah Code § 63-2-302(2)(d) presents a question of law that is reviewed for correctness, giving no deference to the trial court. *See id.*

3. Did the trial court err in concluding that the Investigative Report is properly classified as a protected record under Utah Code § 63-2-304(9)?

Standard of Review: Whether the Investigative Report is properly classified as a protected record under Utah Code § 63-2-304(9) presents a question of law that is reviewed for correctness, giving no deference to the trial court. *See id.*

4. Did the trial court err in failing to segregate any information in the Investigative Report that may properly be classified as non-public from information that is public and order release of a redacted version of the Investigative Report containing the public information?

Standard of Review: Whether the trial court correctly applied GRAMA's segregation provision – Utah Code Ann. § 63-2-307 – presents a question of law that is reviewed for correctness, giving no deference to the trial court. *See id.*

Preservation of Issues for Appellate Review: The *Morning News* properly preserved the foregoing issues in the trial court. (*See, e.g.*, Complaint (Record on Appeal ("R.")) 1; *Morning News'* Motion for Summary Judgment (R. 308); Memorandum in Support of the *Morning News'* Motion for Summary Judgment (R. 314); Reply Memorandum in Support of the *Morning News'* Motion for Summary Judgment and in Opposition to Defendants' Cross-Motion for Partial Summary Judgment (R. 557); Memorandum Decision (R. 593 (*see* Addendum Tab D)); Transcript of Proceedings Before Judge Medley (April 5, 2006) (R. 630); and Notice of Appeal (R. 612).

DETERMINATIVE LAW

Utah's open records statute – the Utah Government Records Access and Management Act, Utah Code Ann. § 63-2-101, *et seq.* ("GRAMA") – is of central importance to this appeal and is set forth verbatim in Tab E of the accompanying Addendum.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below.

This case concerns whether the public and press are entitled under GRAMA to learn the contents of an independently commissioned investigative report that substantiated allegations of official misconduct by a high-ranking Salt Lake County official. In September 2004, a *Morning News* reporter filed a GRAMA request for the independent Investigative Report, which concerned allegations that Chief Deputy County Clerk Nick Floros engaged in a pattern of egregious and persistent sexual harassment of a subordinate employee, Marcia Rice, and possibly other County employees, and that County officials knew about the misconduct but continued to employ him. The County denied the request. After appealing the denial through three levels of administrative review within the County – and being denied at each level – the *Morning News* initiated this action seeking access to the Investigative Report.

The *Morning News'* Complaint requests the following relief: (i) that the Court declare that the Investigative Report is a public record under GRAMA and order its

immediate release, (ii) to the extent the Court determines the Investigative Report contains some information properly classified as non-public under GRAMA, that the Court order redaction of the non-public information and release of the public information, and (iii) if the Court finds that the County properly classified the Investigative Report, in its entirety, as "private" or "protected" under GRAMA, that the Court order release of the Report pursuant to Section 404(8) of GRAMA because the public interests in disclosure outweigh the interests in nondisclosure.

The *Morning News* and the County filed cross-motions for summary judgment on the issue of whether the Investigative Report was properly classified a private or protected record under GRAMA. In its Memorandum Decision entered April 5, 2006, the trial court held that the Investigative Report was properly classified as a private or protected record and, consequently, granted the County's motion and denied the *Morning News'* motion. The *Morning News* appeals this order.[1]

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[1] By Order dated May 11, 2006, the trial court certified its Memorandum Decision as a final order for purposes of appeal pursuant to Rule 54(b) of the *Utah Rules of Civil Procedure* ("Certification Order"). (R. 608). The trial court's Memorandum Decision and Certification Order wholly disposed of the *Morning News'* First Claim for Relief and finally adjudicated the issue of the proper classification, under GRAMA, of the Investigative Report. So that the Memorandum Decision could be certified properly as a final order for purposes of this appeal, the *Morning News* dismissed without prejudice its claim that the Investigative Report, even if properly classified, should be released pursuant to Utah Code Ann. § 63-2-404(8). The only claims pending in the trial court are the *Morning News'* claims for declaratory and injunctive relief and attorneys' fees, which are wholly dependent upon resolution of the issues presented in this appeal.

II. Statement of Facts.

A. Marcia Rice's Allegations of Sexual Harassment Against Chief Deputy Clerk P. Nick Floros.

In November 2003, Marcia Rice, an employee in the Salt Lake County Clerk's Office (the "Clerk's Office"), filed a written complaint of sexual harassment against P. Nick Floros, the Chief Deputy Salt Lake County Clerk (R. 314 at viii (citing R. 329); *see also* R. 127-28 & attachment thereto). Rice supplemented her initial complaint by filing a follow-up report in November 2003 and a Notice of Claim in July 2004. (R. 314 at viii (citing R. 329); *see also* R. 127-28 & attachment thereto at 1; R. 441). Rice claimed that Floros helped her obtain a position in the Clerk's Office for which she was not qualified and then engaged in a persistent pattern of improper sexual advances and sexual harassment. (*Id.*).

Among other things, Rice alleged that Floros (i) during work hours removed his penis from his pants, rubbed it and asked Rice to perform oral sex and engage in other sexual conduct with him; (ii) asked Rice about her sexual relationships and made numerous comments to her of a sexual nature, including that he fantasized about her all the time and got an erection every time she walked into the room; (iii) called Rice at home to discuss work-related topics and would then discuss the pornographic film he was watching, describe to her what was happening, and invite her to engage in similar behavior; (iv) on at least one occasion, walked up behind Rice in her office, began rubbing her shoulders, leaned down and started kissing her neck while he simultaneously

reached his hands down the front of Rice's dress and fondled her breasts; and (v) on several occasions, indicated to Rice that he had an erection. (R. 314 at viii-ix (citing R. 441-42); *see also* R. 353-54; R. 371).

Rice claimed that Floros punished and retaliated against her when she did not return his advances. (R. 314 at viii-ix (citing R. 329-31, R. 441-42)). Rice further alleged that Floros had previously engaged in similar behavior with at least one other female County employee and that County officials knew about Floros' improper behavior but continued to employ him. (R. 314 at ix (citing R. 441)). Rice's initial complaint was brought to the attention of Sherrie Swensen, Salt Lake County Clerk. (R. 314 at ix (citing R. 329)). Swensen advised Floros that a complaint had been filed and placed him on administrative leave pending a final determination of the allegations. (*Id.*).

B. The Partial Summary of the Independent Investigation and Report Contained in the Soltis Letter.

Because of County Clerk Swensen's "long-term professional relationship with Floros and her goal of complete objectivity and fair play," she delegated the investigation of Rice's allegations to the Litigation Division of the Salt Lake County District Attorney's Office, headed by District Attorney David E. Yocum. (R. 314 at x (citing R. 329)). Both Swensen and Yocum were elected to their respective offices on the Democratic Party ticket. In a further effort "to maintain complete objectivity and fair play," the District Attorney's Office commissioned an independent panel to investigate the allegations (*Id.*). The County hired "two extremely competent and respected

employment attorneys" to conduct the investigation and prepare written findings, conclusions and recommendations. (*Id.*).

In February 2004, after more than 100 hours of investigation and the expenditure of approximately $11,000 in taxpayer funds, the independent investigators completed their report (the "Investigative Report") and delivered it to the District Attorney's Office. (R. 314 at x (citing R. 329); *see also* R. 340 & Tab 2 thereto). On February 11, 2004, John Soltis, Director of the District Attorney's Litigation Division, sent Rice a letter (the "Soltis Letter") purporting to summarize the independent investigators' findings and recommendations and to report the administrative action to be taken by the County in response to such findings and recommendations. (R. 314 at xxi (citing R. 329)). The Soltis Letter is a public record, and its content was extensively reported by the local news media. (R. 314 at xxi-xxiii (citing R. 323, 329-40); *see also* R. 351-52).

Soltis stated in his letter that he found the Investigative Report "to be very well reasoned, fair and complete[.]" (R. 314 at xxi (citing R. 330)). Among other things, the Soltis Letter reported the following:

- the investigators concluded that the evidence substantiated Rice's complaint;
- the investigators concluded that Floros had engaged in unwelcome sexual conduct and advances toward Rice and punished her for not reciprocating;
- Floros' conduct constituted "egregious violations" of County policy;

- the investigators would have recommended that Floros be immediately terminated and considered ineligible for future employment with the County; Floros, however, retired just three days before the investigators delivered their report; and
- because Floros retired, "administrative-disciplinary action based on the investigators' findings and recommendation is presently unnecessary." (*Id.*).

Although the Soltis Letter stated that the investigators also focused their investigation on the employment history of the parties, management style, treatment of subordinates, and "appropriate management response," the letter reported no findings, conclusions or recommendations of the investigators concerning those subject matters. (R. 314 at xxi (citing R. 329-31)). Specifically, the Soltis Letter reported no information concerning whether the investigators looked into Rice's allegations that Floros sexually harassed other subordinate female employees and that County managers knew about such misconduct but refused to do anything about it. (*Id.*).

C. The Findings, Conclusions and Recommendations of the Investigative Report.

[*See* "SEALED SUBMISSION OF APPELLANT CONCERNING CONTENT OF INVESTIGATIVE REPORT" (Submitted Under Seal).][2]

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[2] Pursuant to the trial court's Order Granting the *Morning News'* Motion to Compel and for Entry of a Protective Order (Aug. 30, 2005) and Protective Order (Aug. 30, 2005) (R. 208, 234), Section C of this Statement of Facts, describing the content of the Investigative Report that has not been made public, and Section IV of the Argument are submitted separately under seal.

D. The Public Controversy Concerning the Floros Investigation.

The Floros investigation became the subject of a heated political controversy among members of the Salt Lake County Council. (R. 314 at xxii-xxiii (citing R. 322-24, R. 341-45, R. 347-52)). According to the Soltis Letter, the District Attorney's Office retained the independent attorney investigators to conduct the Floros investigation "[i]n an effort to maintain complete objectivity and fair play." (R. 314 at x (citing R. 329)). Questions were raised, however, after the District Attorney's Office refused to release the independent Investigative Report upon its completion. (R. 314 at xxii-xxiii (citing R. 322-24, R. 341-45, R. 347-52)). Local newspaper reports quoted Republican Council members charging that District Attorney Yocum soft-pedaled the investigation because Floros was a friend and fellow Democrat. (R. 314 at xxiii (citing R. 347)). Republican Council members compared Yocum's handling of the Nancy Workman case, in which former County Mayor Workman (a Republican) was charged with felony misuse of public funds, with his handling of the Floros case, in which Floros (a Democrat) was allowed to quietly retire just days before the independent Investigative Report was issued. (R. 314 at xxii (citing R. 341-45)).

District Attorney Yocum and Democratic Council members defended the investigation, responding that a criminal investigation or prosecution of Floros was unwarranted because Rice was not interested in pursuing criminal charges, a claim that Rice, through her attorney, disputed. (*Id.*). Ultimately, although the County Council met

in closed session to discuss whether to conduct its own investigation into Yocum's handling of the Floros matter, no such investigation was conducted. (*Id.*; *see also* R. 348-50).

E. The EEOC Determination of Discrimination and Rice's Federal Lawsuit Against Salt Lake County, Swensen, and Floros.

On July 14, 2004, Rice filed a Notice of Claim against the County advising that she intended to pursue claims against the County and Floros, describing, in detail, Floros' alleged misconduct, charging that Floros engaged in similar misconduct with at least one other female County employee, and that County officials knew of Floros' misconduct but continued to employ him. (R. 314 at xxiii (citing R. 441-42)).

On July 30, 2004, the U.S. Equal Employment Opportunity Commission issued its determination on the merits of Rice's sexual harassment complaint (the "EEOC Determination"). The EEOC determined that reasonable cause existed to believe that the County discriminated against Rice by sexually harassing her, and retaliated against her and "at least one other individual by harassing them when they rejected a supervisor's sexual advances, in violation of Title VII." (R. 314 at xxiv (citing R. 353-54)).

On October 6, 2004, Rice filed a federal civil rights lawsuit against the County, County Clerk Swensen, and Floros, alleging sexual harassment and retaliation. (*Id.* (citing R. 355-73)). Rice alleged in her complaint that Swensen hired Floros knowing that he had a history of harassing behavior toward other Salt Lake County employees. (*Id.* (citing R. 358)). Rice further alleged that after hiring Floros, Swensen was

specifically informed in writing that Floros was "creating a hostile environment" by "inappropriate touching and invasion of 'personal space'" and "continual, improper and uncalled for staring and watching employees." Rice alleged that Swensen did nothing to prevent Floros' alleged misconduct or to protect subordinate employees. (*Id.*).

Rice's Notice of Claim, the EEOC Determination, and Rice's Complaint in the federal court proceeding are public records that were extensively reported upon by the local news media. (R. 314 at xxiii (citing R. 441-42); R. 314 at xxiv (citing R. 353-54); *Id.* (citing 355-73); R. 314 at xxii-xxiii (citing R. 322-24, R. 341-45, R. 347-52)). In addition, during the federal court litigation, the County produced copies of the Investigative Report to Rice, Floros, Swensen, and their respective counsel pursuant to a stipulated protective order that required the parties to keep the Report confidential. (R. 314 at xxv (citing R. 159-73); R. 134 n. 2).

Rice and the County subsequently settled the federal lawsuit, with the County paying Rice and her attorney nearly $100,000.00. (R. 555 at Tab 17).

F. The *Morning News'* GRAMA Request for the Investigative Report and Judicial Appeal of Denial.

In September 2004 – eight months after Floros retired from the County and at the height of the political controversy surrounding the District Attorney's handling of the Floros investigation – the *Morning News* submitted a GRAMA request to the County for a copy of the Investigative Report. (R. 314 at xxv-xxvi (citing R. 3, 28)). The County denied the request, claiming the Report was properly classified as a "private" or

"protected" record under GRAMA. (*Id.*). The *Morning News* appealed the denial through three levels of administrative review within the County, and was denied at each level. (R. 314 at xxvi-xxviii (citing R. 6, 12-15, 322-26, 374-73)). Despite the *Morning News'* request, none of the County GRAMA appeal authorities actually reviewed the Investigative Report before ruling on the merits of the *Morning News'* appeal. (*Id.*).

On December 14, 2004, during the final administrative appeal hearing before the Salt Lake County Council, counsel for the *Morning News* requested that the Council conduct an *in camera* review of the Report to determine whether the record was properly classified under GRAMA. (R. 314 at xxvii (citing R. 467); *see also* R. 4 ¶ 10; R. 28 ¶ 5). The District Attorney's Office objected, however, stating that the District Attorney would seek a court order preventing the Council from reviewing the Investigative Report. (R. 314 at xxviii (citing R. 467); *see also* R. 12 at 2).

On December 21, 2004, the County Council reconvened and determined that an *in camera* review of the Report by the Council was appropriate and necessary (i) to determine whether the Report was properly classified; (ii) to comply with the Council's statutory duty to segregate and release information that the requester is entitled to inspect; and (iii) to weigh the various interests and public policies favoring disclosure and nondisclosure of the Report (R. 314 at xxviii (citing 472-73); *see also* R. 12-13). However, to avoid the substantial delay and expense associated with litigation over the issue of whether the Council had the right to review the Investigative Report, and to

expedite judicial consideration of the merits of the *Morning News*' GRAMA appeal, the Council issued an order, stipulated to by the *Morning News* and the District Attorney's Office, denying the *Morning News*' GRAMA appeal and certifying such order as final for purposes of petitioning the District Court for relief. (*Id.*).

On January 12, 2005, the *Morning News* filed its Complaint seeking judicial review of the County's denial of its GRAMA request, as provided under Utah Code Ann. §§ 63-2-402(1)(b) and 63-2-404. The *Morning News* sought a judicial declaration that the Investigative Report is a public record and ordering the County to release it. (R. 9-10). The *Morning News* and the County filed cross-motions for summary judgment on the issue of whether the Investigative Report was properly classified a private or protected record under GRAMA. (R. 308-14, R. 555).

G. The Trial Court's Memorandum Decision.

On April 5, 2006 – more than a year-and-a-half after the *Morning News* submitted its GRAMA request for the Investigative Report – the trial court issued its Memorandum Decision ruling that the Report was properly classified as a private or protected record. Consequently, the court granted the County's motion and denied the *Morning News'* motion. (R. 593-602; *see also* Tab D to Addendum).

The trial court based its ruling on two conclusions. First, in finding that release of the Investigative Report would constitute a clearly unwarranted invasion of personal privacy under Section 302(2)(d) of GRAMA, the court asserted that it was *Floros* whose

privacy would be unjustly invaded if the Report – which substantiated allegations about Floros' misconduct as a *public official* – were released. This conclusion was not based on a finding that the Report contained baseless allegations about Floros, but rather on the fact that the Report was independent and credible. The court stated, "[r]eason dictates that there exists within the contents of the full investigative report more express information concerning the alleged perpetrator [Floros] than exists in the Soltis letter, and more *even-handed* findings than can be found in the allegations contained in the [Marcia Rice] federal [lawsuit] or EEOC complaints. This is information, unique to the investigative report, the disclosure of which would constitute a clearly unwarranted invasion of the *alleged perpetrator's* privacy." (R. 593 (emphasis added)). Accordingly, the trial court concluded the Investigative Report was properly classified as a private record under Section 302(2)(d) of GRAMA.

Second, even though the investigation into Floros' conduct had long been concluded, and even though the County did not identify any specific investigation that would be compromised by release of the Report, the trial court held that release of the Investigative Report "reasonably could be expected to interfere" with future investigations or disciplinary or enforcement proceedings, meaning the Report was properly classified as a protected record under Section 304(9) of GRAMA. (R. 599-600). This conclusion was based on the trial court's sweeping assertion that, "in the public's eyes," a determination that this specific Investigative Report was public would carry "an

implication that there is a chance that all such investigative reports could be made public as well, depending upon how badly the information is wanted," thus possibly chilling the participation of witnesses and victims in unspecified future sexual harassment investigations. (R. 600).

Although requested by the *Morning News*, the trial court did not address the issue of whether a redacted version of the Investigative Report could be released that segregated any non-public information and disclosed the public information, as provided in Section 307 of GRAMA. (R. 314 at 11; R. 593-602).

The trial court's Memorandum Decision is the subject of this appeal. (R. 612-13).

SUMMARY OF ARGUMENT

The trial court's refusal to order release of the Investigative Report – a document of manifest public interest about official misconduct and the operation of County government – was clearly incorrect. Neither of the two exceptions cited by the trial court permits the County to keep the Report from the public.

First, the trial court erred in concluding that the Report is "private" because its release would constitute a "clearly unwarranted" invasion of Floros' personal privacy. The Report is not about Floros' personal life; it is about his alleged abuse of a public office, as well as whether County officials knew about such misconduct and ignored it. As such, the Report bears directly on "the conduct of the public's business." *See* Utah Code Ann. 63-2-102(1)(a). The significant public interest in disclosure of the Report,

which the trial court failed to consider, far outweighs the privacy interests, if any, in secrecy.

Second, the trial court erred in concluding that the Report is "protected" because its release would interfere with future sexual harassment investigations. From the time the Report was first requested until the Court ruled on this matter, there was no pending investigation of Floros, nor did the County submit evidence of any other investigation or proceeding that would be compromised by release of the Report. Speculative interference with unspecified future investigations is insufficient to classify a record as protected under GRAMA. The trial court's ruling amounts to a categorical exception for all investigative reports – a sweeping policy decision that the Legislature has never made, and a dangerous expansion of permissible government secrecy.

Finally, even if the Report did contain some information that the public is not entitled to inspect, which it does not, GRAMA requires the County to redact the non-public information and release the public information. The trial court erred in failing to require such redaction.

Because the Report is not properly classified as a private or protected record, it is public and the *Morning News* is entitled to judgment ordering its release. The trial court's decision should be reversed.

ARGUMENT

I. The Investigative Report is Presumed to be a Public Record, and it was the County's Burden Below to Establish its Legal Exemption from Public Disclosure.

The lodestar of GRAMA is the presumption of public access to government records. "A record is public unless otherwise *expressly provided* by statute." Utah Code Ann. § 63-2-201(2) (emphasis added). The Utah Legislature has rooted this presumption of public access in "the public's right of access to information concerning the conduct of the public's business . . ." Utah Code Ann. § 63-2-102(1)(a). Moreover, in enacting GRAMA, the Legislature expressly declared its intent to "promote the public's right of easy and reasonable access to unrestricted public records;" to "specify those conditions under which the public interest in restricting access to government records may outweigh the public's interest in access;" to "prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter;" and to "favor public access" in cases "where countervailing interests are of equal weight . . ." *Id.* § 63-2-101(3).

Utah's strong public policy favoring access to information concerning the conduct of the public's business – as reflected in GRAMA and its statutory predecessors – has long been recognized by this Court. In *KUTV Inc. v. Utah St. Bd. of Educ.*, 689 P.2d 1357 (Utah 1984), the Court stated that "[t]he presumption in cases such as this has always been public access, subject only to specific statutory restrictions, personal privacy

rights, and countervailing public policy . . . . The Court recognizes that it is the policy of this state that public records be kept open for public inspection in order to prevent secrecy in public affairs." *Id.* at 1361; *see also Redding v. Brady*, 606 P.2d 1193, 1196 (Utah 1980) ("Both our state and federal constitutions contain assurances as to freedom of information and expression. . . . . We regard it as in conformity with the law, and wise as a matter of policy, to require disclosure of information in which the public has an interest. . . ."); *Deputy Sheriffs Mut. Aid Ass'n of Salt Lake Co. v. Salt Lake Co. Deputy Sheriffs Merit Comm'n*, 466 P.2d 836, 837 (Utah 1970) ("We believe and hold that they are public writings and that those interested should be able to examine them. This conclusion seems to reflect the intention of the legislature. . . .").

Because of the statutory presumption of access to government records, it was the County's burden below to come forward with evidence establishing that the specific record in question – the Investigative Report – is expressly exempt from public disclosure under GRAMA. *See* Utah Code Ann. § 63-2-201(2) ("A record is public unless otherwise expressly provided by statute."); *KUTV*, 689 P.2d at 1361 (interpreting the statutory predecessor to GRAMA); *see also United States v. Ray*, 502 U.S. 164, 173 (1991) (holding under analogous federal FOIA statute that "the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents"). Failure of the non-moving party on summary judgment to come forward with evidence "sufficient to establish the existence of an element essential to that party's

case" entitles the moving party to judgment as a matter of law. *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 23, 116 P.2d 323 (internal quotation omitted).

As demonstrated in the following sections, the trial court erred in concluding that the Investigative Report is properly classified as private or protected under GRAMA because the County failed to present facts establishing that such classification was proper. Because the County failed to rebut the statutory presumption of public access to the Investigative Report, the *Morning News* is entitled to summary judgment declaring the Report a public record.

II. The Trial Court Erred in Concluding that the Independent Investigative Report Is a Private Record Under Utah Code Ann. § 63-2-302(2)(d).

The trial court's application of Section 302(2)(d) contains two different errors. First, the trial court failed to give any consideration to the public interest in release of the Report. Such consideration is necessary to determine whether an invasion of privacy is "clearly unwarranted," as GRAMA requires. Second, the trial court's conclusion that release of the Report would unjustly invade the privacy of *Floros* – the perpetrator whose official misconduct was substantiated by the Report – has no basis in logic, law, or fact. Floros has no "privacy right" to conceal his substantiated sexual harassment of subordinate County employees, and there is no evidence in the record that release of the Report would unjustly invade the privacy of anyone else. The trial court's conclusion that the Report is a "private record" is erroneous and should be reversed.

A. The Trial Court Failed to Give Any Consideration to the Public Interest in Release of the Report.

Pursuant to Utah Code Ann. § 63-2-302(2)(d), a record may properly be classified as private only if it "contain[s] data on individuals the disclosure of which constitutes a clearly unwarranted invasion of personal privacy." Utah Code Ann. § 63-2-302(2)(d). Because this exception only protects against the disclosure of data on individuals that would cause a "clearly unwarranted" invasion of personal privacy, it clearly does not preclude public access to all records that contain "data on individuals."[3] Rather, the statute necessarily requires government entities to balance the "public's right of access to information concerning the conduct of the public's business" against "the right of privacy in relation to personal data gathered by governmental entities." Utah Code Ann. § 63-2-102(1).

Where, for example, the record concerns the conduct or misconduct of public officials, expenditure of public funds, or other "conduct of the public's business," as the Report does here, the public interest in disclosure is high. In such cases, the disclosure of information in the record that might prove embarrassing or nettlesome to public officials,

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[3] To read the statute so broadly would eviscerate the statutory presumption of access and secrete a multitude of government records that contain information about individuals but which are public under GRAMA, including, for example, police reports, arrest warrants, occupational and professional licenses, and notices of agency action. *See* Utah Code Ann. § 63-2-301(3) ("The following records are normally public, but to the extent a record is expressly exempt from disclosure, access may be restricted under . . . Section 63-2-302[.]").

and which they may prefer to keep secret, nevertheless may be warranted. *See, e.g., Redding v. Brady*, 606 P.2d 1193 (1980) (ordering disclosure of salary information of state higher education employees notwithstanding claim of privacy invasion).

The trial court, however, failed to give any consideration to the substantial public interests favoring disclosure of the Investigative Report. (R. 593-602; *see also* Tab D to Addendum). Had it done so, there is no question that the significant public interest in disclosure of the Report would have outweighed any privacy interests at stake. This is so for at least three reasons.

First, the Report not only concerns the conduct of the public's business, it goes to the heart of it. The Report concerns allegations that a high-ranking Salt Lake County official engaged in egregious and persistent sexual harassment of subordinate employees and that County officials knew about such misconduct and continued to employ him. (R. 314 at viii (citing R. 329); R. 441; R. 353-54; R. 371; *see also* R. 127-28 & attachment thereto). Although the full content of the Report remains secret from the public, the partial summary contained in the Soltis Letter reveals that the Report (i) substantiates Rice's complaint against Floros, (ii) finds that Floros had sexually harassed Rice and punished her for not reciprocating his advances, and (iii) recommends that Floros be immediately terminated and considered ineligible for employment with the County. (R. 314 at xxi (citing R. 330)). The public obviously has a compelling interest in learning what the independent investigators found regarding the nature and extent of such

misconduct, what County managers knew about it, and what actions, if any, County managers took in response to it.

Second, the public has a compelling interest in scrutinizing the process that produced the Report. The District Attorney's handling of the Floros investigation was a matter of considerable public interest and controversy. (R. 314 at xxii-xxiii (citing R. 322-24, R. 341-45, R. 347-52)). To allay fears of political cronyism and bias, and to "maintain complete objectivity and fair play," the District Attorney commissioned an independent panel of outside attorneys to investigate the allegations against Floros and report their findings, conclusions, and recommendations. (R. 314 at x (citing R. 329)). The Report is the product of that independent investigation. In this respect, the Report is significantly different than other, more routine internal investigative reports of alleged sexual harassment in the government workplace. Without access to the content of the Report, members of the public, including County employees who are entitled to a workplace free from sexual harassment, are left in the dark concerning whether the investigation was, in fact, objective, fair and thorough. The incomplete summary of the investigators' findings and recommendations contained in the Soltis Letter is wholly inadequate for this purpose. Release of the Report would provide a valuable public check on the integrity of the independent investigation and promote the public accountability of the elected officials responsible for the investigation, including, specifically, District Attorney Yocum and County Clerk Swensen.

Third, the Report, which the District Attorney's Office characterized as "very well reasoned, fair and complete," is the product of 100 hours of investigation and the expenditure of approximately $11,000 in taxpayer funds. (R. 314 at x (citing R. 239); *see also* R. 340 & Tab 2 thereto). In addition to the significant public interest in learning about official misconduct and promoting the accountability of public officials responsible for its investigation, the public has a right to see how its tax dollars are being spent. *See, e.g., Redding v. Brady*, 606 P.2d 1193, 1196 (Utah 1980) ("It seems to us that there is even a greater potential for evil in permitting public funds to be expended secretly. . . We regard it as in conformity with the law, and wise as a matter of policy, to require disclosure of information in which the public has an interest . . . .").

As demonstrated below, these significant public interests favoring disclosure of the Investigative Report clearly outweigh the privacy interests, if any, implicated by the Report. Given the undisputed facts in the summary judgment record before it, the trial court erred in concluding otherwise.

B. The Trial Court Erred in Concluding that Release of the Report Would Constitute a Clearly Unwarranted Invasion of Floros' Personal Privacy.

Perhaps the most unusual conclusion in the trial court's decision is the holding that Floros has a personal privacy interest in concealing his misconduct as a *public official* –

an argument that the County did not even attempt below.[4] Even stranger, the court reached this conclusion not because it found that the Report contained baseless allegations against Floros, but rather because the Report *substantiated* Rice's allegations of official misconduct. (R. 314 at xxi (citing R. 329-30)). The court explained its reasoning as follows:

> Reason dictates that there exists within the contents of the full investigative report more express information concerning the alleged perpetrator [Floros] than exists in the Soltis letter, and more *even-handed* findings than can be found in the allegations contained in the [Marcia Rice] federal [lawsuit] or EEOC complaints. This is information, unique to the investigative report, the disclosure of which would constitute a clearly unwarranted invasion of the *alleged perpetrator's* privacy.

Id. (emphasis added).

The trial court's conclusion is obviously in error. It is not an invasion of personal privacy to disclose the misconduct of a public official, much less the "clearly unwarranted" invasion required by GRAMA. The Report is not an expose on Floros' personal life. It concerns misconduct that occurred while Floros was acting in his *official* capacity as the Chief Deputy Clerk and his alleged abuse of that office to harass County employees. Floros has no reasonable expectation of privacy in concealing such conduct from the public. Numerous courts from other states have affirmed this principle in upholding release of investigative reports involving allegations of official misconduct.

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[4] The County instead argued that the Report should be kept secret to protect the privacy of witnesses interviewed for the Report, an assertion that also fails for reasons discussed below.

See, e.g. Fincher v. Georgia, 497 S.E.2d 632, 636 (Ga. Ct. App. 1998) (affirming release of an investigatory report in a sexual harassment case involving a public employee because the "public interest in obtaining the information outweighed [the accused's] privacy interest"); *Antell v. Attorney Gen.*, 752 N.E.2d 823, 826 (Mass. Ct. App. 2001) ("[T]he public interest in disclosing allegations of official misconduct at the conclusion of an investigation generally outweighs the privacy interests of participants in a cold investigation."); *Citizens to Recall Mayor James Whitlock v. Whitlock*, 844 P.2d 74, 78 (Mont. 1992) (holding that because public officials "occupy unique positions in regard to expectation of privacy,"disclosure of investigation into public official's alleged sexual harassment did not violate his right to privacy); *Local 2849 v. Rock County*, 689 N.W.2d 644, 654-55 (Wis. Ct. App. 2004) (affirming release of investigatory records detailing law enforcement officers' use of department computers to view inappropriate images because officers' interest in privacy did not overcome "strong public interest in obtaining information regarding their activities while on duty").

This distinction between private and public conduct is reflected in the County's own GRAMA Ordinance, which favors public disclosure of records when the information sought concerns "public figures" or government workings and activities. *See* S.L. Co. Ord. 2050 §§ 4.5.3 and 4.5. 4. (R. 446).

Moreover, the fact the Investigative Report contains more "even-handed" (i.e., credible) findings than the allegations contained in Rice's federal court or EEOC

complaints, which are already a matter of public record, undermines, rather than supports, the trial court's conclusion that release of the Report would constitute an unwarranted invasion of Floros' personal privacy. The public interest in learning about the more "even-handed" findings contained in the Investigative Report – a report the District Attorney's Office characterized as "very well reasoned, fair and complete" – is certainly equal to if not greater than its interest in learning about the bare allegations themselves. This is particularly so in light of the fact the independent investigators *substantiated* Rice's allegations, found that Floros had committed "egregious violations" of County policy, and would have recommended his immediate termination had he not resigned just days before the Report was issued. (R. 314 at xxi (citing R. 330)).

GRAMA's privacy exception was never meant to shield official misconduct from the public view. The trial court's conclusion to the contrary was erroneous and should be reversed.

C. There is No Evidence that Disclosure of the Investigative Report Would Constitute a Clearly Unwarranted Invasion of Any Other Person's Privacy.

There is no other privacy interest that warrants classification of the Report as a private record. First, with respect to Rice, she has already disclosed her identity and made public the details of the alleged harassment. Her Notice of Claim against the County, the public EEOC Determination, and her complaint in federal court contain extensive, highly personal details concerning the alleged sexual harassment. (R. 314 at xxiii (citing R. 441-

42); R. 314 at xxiv (citing R. 355-73)). In addition, after filing her Notice of Claim, Rice's attorney made statements to the press about Rice's claim. (R. 341-42; R. 350-52). In making these disclosures and seeking damages and redress for her injury in the public courts, Rice has relinquished any privacy interest she may have had in the information contained in the Report. (R. 314 at xxiii (citing R. 441-42); R. 314 at xxiv (citing R. 355-73)).

Moreover, the fact that Rice never intervened and objected to disclosure of the Report during three County administrative appeal proceedings or in the court proceedings below demonstrates, at a minimum, that Rice is not averse to public disclosure of information concerning the misconduct of which she was a victim.

Second, with respect to County Clerk Swensen, disclosure of the Report would not constitute a clearly unwarranted invasion of her personal privacy because she is an elected County official and the Report concerns conduct that occurred in her office and on her watch. *See* cases cited *supra* at 24-25. Swensen has no legitimate privacy interest in preventing public scrutiny of her office or the conduct of her Chief Deputy. As demonstrated above, release of the Report will shed considerable light on the conduct of the public's business, and the public interest in disclosure is compelling.

Finally, with respect to the other witnesses interviewed for the Report, there is no evidence that any witness has objected to disclosure. Indeed, at least two County employees interviewed by investigators – Amy DaSilva and Audrey Sharpsteen – have

stated they support release of the Report to prevent retaliation against witnesses who cooperated with investigators and to shed light on Floros' conduct and the workings of the County Clerk's Office. *See* Memorandum in Support of Motion for Leave to File Brief of Amicus Curiae Amy DaSilva and Audrey Sharpsteen (Oct. 5, 2006) at 3. Moreover, for reasons that will become obvious to the Court upon review of the Report, and which are discussed in the *Morning News'* Sealed Submission, release of the Report would not cause a clearly unwarranted invasion of personal privacy of any of these individuals. *See Morning News'* Sealed Submission at 9-12.

In sum, the County failed to present evidence on summary judgment sufficient to conclude that disclosure of the Report would constitute "a clearly unwarranted invasion of personal privacy," as required under Section 302(2)(d). The trial court's conclusion that release of the Report would constitute a clearly unwarranted invasion of Floros' personal privacy is wholly unsupported by the record, erroneous as a matter of law, and should be reversed.

III. The Trial Court Erred in Concluding that the Independent Investigative Report Was a Protected Record Under Utah Code Ann. § 63-2-304(9).

The only other basis for the trial court's refusal to release the Report is its conclusion that the Report is a "protected" record under Section 304(9) of GRAMA. That section provides protected status for the following records *if properly classified*:

> records created or maintained for civil, criminal, or administrative enforcement purposes, if release of the records:

> (a) *reasonably could be expected to interfere with investigations* undertaken for enforcement, discipline, licensing, certification, or registration purposes; (b) reasonably could be expected to interfere with audits, disciplinary, or *enforcement proceedings*; . . .

Utah Code Ann. § 63-2-304(9) (emphasis added).

At the time the *Morning News* submitted its GRAMA request for the Investigative Report, the independent investigation had concluded; Floros had retired from County employment; the District Attorney had reported the investigators' summary of findings and disposition to Rice, concluding that "administrative-disciplinary action" was unnecessary; and Rice had filed her federal civil rights lawsuit against the County, Floros and Swensen. (R. 314 at xxi (citing R. 329-31); R. 314 at xxv-xxvi (citing R. 3, 28)). Accordingly, release of the Report could not interfere with investigation or disciplinary proceedings related to Floros, as the trial court found. (R. 598-99).

The investigation of Floros, however, was the *only* investigation specified in the record. The County presented no evidence of any other specific investigation that would be compromised by release of the Report; indeed, it presented no evidence of any other investigation at all. Instead, the County proposed a sweeping expansion of Section 304(9), one which does not require evidence of any actual investigation. According to the County's interpretation, a record can be classified as protected based solely on the chance that its release might interfere with some hypothetical investigation some time in the future. Based on this speculation, the County claimed that Section 304(9) applied.

Remarkably, the trial court accepted the County's argument. It did not require any evidence of an actual investigation that would be compromised by release of the Report, nor did it analyze whether release of this Report would interfere with future investigations.[5] Instead, the court saw itself as issuing a categorical ruling on all sexual harassment investigative reports, stating that, "in the public's eyes," a determination that this specific Investigative Report was public "carries an implication that there is a chance that all such investigative reports could be made public as well, depending upon how badly the information is wanted," thus possibly chilling the participation of witnesses and victims in some future, hypothetical sexual harassment investigation. (R. 600).

The trial court's interpretation is a breathtaking expansion of the investigation exception, and it should be rejected by this Court for at least two reasons: (1) it facilitates unjust government secrecy based on nothing more than speculation, as numerous courts interpreting the analogous provision of the federal Freedom of Information Act ("FOIA") have concluded; and (2) it creates a categorical exception for all sexual harassment investigative reports, which is a policy decision for the Legislature, not the courts.

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[5] Ironically, in this case, the opposite is more likely true. Public disclosure of the Investigative Report is more likely to foster confidence among the public and County employees that the County takes allegations of sexual harassment seriously, investigates them thoroughly, and holds public officials accountable for their conduct. This is particularly so where, as here, the alleged perpetrator is a high-ranking County official accused of harassing subordinates. Victims and witnesses are more likely to come forward and report sexual harassment if they see evidence that the County takes seriously sexual harassment allegations against such officials and investigates them thoroughly.

A. Section 304(9) is Limited to Pending or Contemplated Investigations or Proceedings.

In *Badran v. United Sates*, 652 F. Supp. 1437, 1438 (N.D. Ill. 1987), Badran, an immigrant, filed suit under FOIA to obtain disclosure of all of the documents in her immigration file, including a report of the INS's investigation of her case. The government denied access to the investigative report under an exemption in FOIA analogous to Section 304(9) of GRAMA, which exempted from disclosure "investigatory records compiled by law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings[.]" 5 U.S.C. § 552(b)(7)(A).

Like the County here, the INS conceded that no pending or contemplated enforcement proceeding would be endangered by release of the INS investigative report. It nevertheless argued that the classification was proper because the report contained information that the INS "could use against a person who might someday violate immigration laws." *Badran*, 652 F. Supp. at 1440.

The *Badran* court had little difficulty rejecting this argument:

> This position is bewildering and indefensible. An agency may not assert the "enforcement proceedings" exception to FOIA "when there is no enforcement proceeding then pending or contemplated." No court has ever held to the contrary. If an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on some hypothetical enforcement proceeding, the FOIA would be meaningless; all information could fall into that category. The INS must disclose the Report of Investigation.

Id. (citations omitted).

Numerous other courts have agreed. *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 230-32, 98 S. Ct. 2311 (1978) (emphasizing that Congress did not intend for the "enforcement proceedings" exception to "endlessly protect material simply because it was in an investigatory file"); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 870 (D.C. Cir. 1980) (holding that "enforcement proceedings" exception only exempts from disclosure information that is "still under investigation or being actively pursued," not "yellowing documents contained in long-closed files"); *Nat'l Sec. Archive v. F.B.I.*, 759 F. Supp. 872, 883 (D.D.C. 1991) (concluding that "enforcement proceedings" exception "cannot justify withholding unless the material withheld relate[s] to a concrete prospective law enforcement proceeding" (internal quotation marks omitted)).

The reasoning in *Badran* and other cases construing the FOIA exception is equally applicable here. A government entity relying on Section 304(9) to deny access to a record on the ground that it would interfere with an investigation or proceeding must identify a pending or contemplated investigation that would be interfered with by release of the record. There was no concrete investigation or proceeding at issue in this case and therefore the exception does not apply. To read the exception otherwise, and as the trial court did below, would allow any record relating to "civil, criminal, or administrative enforcement purposes" to be concealed because release of any such record could

hypothetically chill the participation of victims and witnesses in such investigations or proceedings. Such a construction would render GRAMA, and its presumption of public access to government records, meaningless.

B. The Trial Court's Interpretation Creates a Categorical Exception for All Sexual Harassment Investigative Reports.

The trial court's interpretation is not only improvident as a matter of government secrecy, it is also flawed analytically. GRAMA requires access determinations to be made on a case-by-case basis, considering the specific record in question and whether its release would cause harm to those countervailing public interests expressly identified in the exceptions to public disclosure. It does not ask the court to create categorical exceptions or decide the fate of all similar records. That, however, is precisely what the trial court did in this case, asserting that a determination that this specific Investigative Report was public "carries an implication that there is a chance that all such investigative reports could be made public as well, depending upon how badly the information is wanted[.]" (R. 600). From this "implication" of a "chance," the trial court concluded that release of the Report might chill witnesses who want confidentiality from participating in future investigations, and thus the Report is a protected record.[6]

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[6] Significantly, the County presented no evidence that the independent investigators in *this* case promised confidentiality to any witnesses or that the investigators ever expected the Report to remain confidential. (R. 555). In fact, for reasons explained in the *Morning News'* Sealed Submission, the content of the Report supports the opposite conclusion.

If that is all that Section 304(9) requires, then no sexual harassment investigative report would ever be released. Indeed, no investigative report of any nature would be released, since the government could always raise the "chance" that a future investigation might occur, and future witnesses might know about this particular ruling, and those witnesses might be chilled from participating if they happen to want confidentiality. Even worse, the trial court implied that this categorical secrecy classification would exist indefinitely, "irrespective of the passage of time, and the change of circumstances." (R. 599).

While putting all investigative reports off limits to the public forever may arguably be a plausible policy decision, that is a policy choice for the Legislature, not the courts. The Legislature did not make that choice in GRAMA. Under GRAMA, "[a]ll records are public unless *expressly classified* otherwise by statute." Utah Code Ann. § 63-2-201(2) (emphasis added). There is no provision in GRAMA expressly classifying as non-public investigative reports of sexual harassment in government workplaces, much less classifying as non-public the independently commissioned Investigative Report at issue here.

In this case, there is no evidence that release of this specific Report would interfere in any way with any specific investigation. Given this lack of evidence, the trial court's conclusion that Section 304(9) applies is erroneous and should be reversed.[7]

IV. The Content of the Independent Investigative Report Supports the Conclusion that it is a Public Record.

[*See* "SEALED SUBMISSION OF APPELLANT CONCERNING CONTENT OF INVESTIGATIVE REPORT" (Submitted Under Seal).]

V. The Trial Court Erred in Failing to Redact any Non-Public Information in the Report and Release the Public Information.

Finally, even if there were some part of the Report that contained information to which the public is not entitled, which there is not, GRAMA requires the County to segregate information to which the public is entitled and release that information. Utah Code Ann. § 63-2-307. Neither the County nor the trial court made any attempt to do so

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[7] The County argued half-heartedly below that its concealment of the Investigative Report also was proper under Utah Code Ann. Sec. 63-2-304(17), which protect records constituting attorney work-product. (R. 555 at 6-7). The trial court did not rely on this exception in upholding the County's nondisclosure, and the exception clearly is inapplicable to the Report. The County admitted that the Report was prepared pursuant to the County's sexual harassment policy, *not* in preparation for litigation with Rice. (R. 555 at xxi, ¶ 4; *see also* R. 314 at xvii (citing R. 127-28 & attachment thereto at 17; *id.* at 1). The Report does not contain the legal impression of attorneys preparing a litigation defense but rather reports the findings of an *independent* investigation of alleged sexual harassment by a County official. (R. 314 at x (citing R. 329)). And, if that were not obvious enough, the County's disclosure of the Report to Rice and her counsel during the federal court litigation is patently inconsistent with the County's after-the-fact assertion that the Report constitutes attorney work-product. (R. 314 at xxv (citing R. 159-73); R. 134 n. 2).

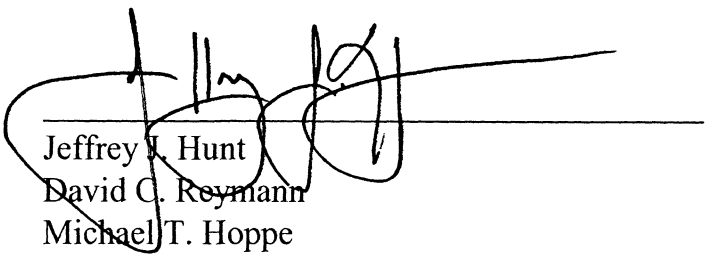
in this case, instead insisting that the entire Report should be kept secret. Should this Court determine there is some information in the Report to which the public is not entitled, the Court should order redaction of such information and release the remainder of the Report pursuant to Utah Code Ann. § 63-2-307.

CONCLUSION

For the foregoing reasons, and those contained in the *Morning News'* Sealed Submission, the Memorandum Decision of the trial court should be reversed, and the matter remanded for entry of judgment in favor of the *Morning News*.

RESPECTFULLY SUBMITTED this 12 day of October 2006.

PARR WADDOUPS BROWN GEE & LOVELESS



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of October 2006, two true and correct copies of the foregoing **BRIEF OF APPELLANT** was served via United States Mail, first-class, postage prepaid, upon the following:

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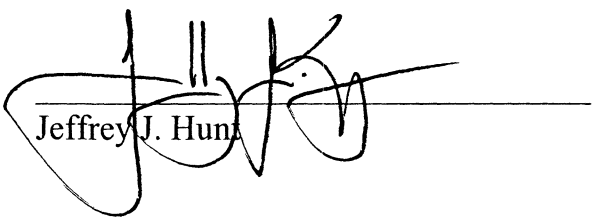

Jeffrey J. Hunt